LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 10 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1008.

BERNES B. STONE,
Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

JACK G. DAY,
1748 Standard Building,
Cleveland, Ohio 44113,

WILLIAM E. RUMMAGE,
530 Frederica Street,
Owensboro, Kentucky,
Counsel for Petitioner.

(Attorneys for the Commonwealth on the inside front cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

WILLIAM M. GARY,
Commonwealth Attorney,
6th Judicial District of Kentucky,
Owensboro, Kentucky,

ROBERT MATTHEWS,
Attorney General for the
Commonwealth of Kentucky,
Frankfort, Kentucky,
Attorneys for the Commonwealth.

TABLE OF CONTENTS.

Opinions in the Courts Below ---------- 1

Jurisdiction ---------- 2

Questions Presented ---------- 2

The Constitutional and Statutory Provisions Involved 3

Statement of the Case ---------- 5

Reasons for Allowing the Writ ---------- 9

I. The Amendment of an indictment to allege a new offense after the trial begins deprives the accused of his right to be informed of the nature and cause of the accusation and his right to the assistance of Counsel ---------- 9

II. The participation of a private investigator in concert with State officials in what is an otherwise illegal search and seizure will not render the product invulnerable to Fourth Amendment attack ---------- 10

III. The refusal of the Trial Court to make the initial determination whether defendant's consent validated the product of a search (otherwise infirm under the Fourth Amendment) is a denial of Due Process ---------- 12

IV. The instructing of a jury on an issue not supported by evidence with a resultant conviction exposes the accused to a conviction without Due Process of law ---------- 12

V. Where, under local law, the years of sentence are a matter for the Jury, the accused is deprived of a jury trial in violation of the Sixth and Fourteenth Amendments when the number of years is determined by a quotient verdict ---------- 13

VI. The Trial Court's application of the exclusion of witnesses rule to (1) allow testimony inculpating the accused and (2) refuse testimony exculpating him constituted an abuse of discretion in violation of both the Due Process and Equal Protection provisions of the Fourteenth Amendment ____ 14

Conclusion ____ 15

Appendix. (Attached):

Opinion of the Court of Appeals of Kentucky by Judge Hill, Affirming, February 17, 1967 ____ 1a

Dissenting Opinion by Judge Palmore, February 17, 1967 ____ 10a

Order of the Court of Appeals of Kentucky, October 13, 1967 ____ 10a

Relevant Excerpts From Transcript of Record ____ 11a

Indictment ____ 11a

Indictment as Amended Pursuant to Motion of Commonwealth on September 1, 1964 ____ 12a

Order, September 8, 1964 ____ 13a

Order, September 11, 1964 ____ 14a

Court's Instructions ____ 14a

Verdict ____ 15a

Order, September 11, 1964 ____ 15a

Motion for New Trial, Filed Sept. 11, 1964 ____ 15a

Supplemental Motion and Grounds for New Trial ____ 17a

Judgment, September 18, 1964 ____ 20a

Relevant Excerpts From Transcript of Evidence ____ 20a

TABLE OF AUTHORITIES.

Cases.

Brady v. Maryland, 373 U.S. 83 (1963) ---------- 14

Burdeau v. McDowell, 256 U.S. 465 (1921) ---------- 11

Camara v. Municipal Court, 387 U.S. 523 (1967) 18 L. ed. 930 ---------- 11

Douglas v. Alabama, 380 U.S. 415 (1965) ---------- 10

Elkins v. United States, 364 U.S. 206 (1960). ---------- 11

Escobedo v. Illinois, 378 U.S. 478 (1964) ---------- 10

Gideon v. Wainwright, 372 U.S. 335 (1963) ---------- 10

Giles v. Maryland, ---- U.S. ----, 17 L.ed. 2d 737 (1967) ---------- 15

Hamilton v. Alabama, 368 U.S. 52 (1961) ---------- 10

Jackson v. Denno, 378 U.S. 368 (1964) ---------- 12

Lund v. Kline, 133 Ohio St. 317, 13 N.E. 2d 575 (1938) ---------- 13

Mapp v. Ohio, 367 U.S. 643 (1961) ---------- 11

Miranda v. Arizona, 384 U.S. 436 (1966) ---------- 10

Palko v. Connecticut, 302 U.S. 319 (1937) ---------- 10

Pointer v. Texas, 380 U.S. 400 (1965) ---------- 10

Powell v. Alabama, 287 U.S. 45 (1932) ---------- 9

Shelley v. Kraemer, 334 U.S. 1 (1948) ---------- 11

Thompson v. Louisville, 362 U.S. 199 (1960) ---------- 12, 13

United States v. Cruickshank, 92 U.S. 542 (1876) ---------- 9

Washington v. Texas, ---- U.S. ---- (1967), 18 L. ed. 1019 ---------- 10

Yick Wo v. Hopkins, 118 U.S. 356 (1886) ---------- 15

Constitution.

Constitution of the United States:
Fourth Amendment ---------- 2, 3, 10
Sixth Amendment ---------- 2, 3, 4, 10, 13
Fourteenth Amendment ---------- 3, 4, 10, 13, 14

Statutes.

KRS 227.270 ---------- 4, 11
28 U. S. C. 1257(3) ---------- 2

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

BERNES B. STONE,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

The petitioner, Bernes B. Stone, asks that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Kentucky made and entered on February 17, 1967 affirming the verdict and judgment made and entered in the Daviess (County) Circuit Court on September 11, 1964 and September 18, 1964 respectively. A petition for rehearing in the Court of Appeals of Kentucky was denied on October 13, 1967. This action was evidenced by the mandate of the same date.

OPINIONS IN THE COURTS BELOW.

The Trial Court rendered no opinion.

The opinion of the Court of Appeals of Kentucky is officially reported in ____ Ky. _____, 418 S.W. 2d 646 (1967) and is reprinted in Appendix 1a-10a.

The entries affirming the verdict and judgment in the Trial Court thus denying petition for rehearing are reproduced in Appendix 10a-11a.

JURISDICTION.

The final judgment of the Court of Appeals of Kentucky, the State Court of last resort, was entered on October 13, 1967 upon denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3). Petitioner claims that his conviction was acquired in violation of rights, privileges and immunities secured by the Constitution of the United States.

QUESTIONS PRESENTED.[1]

I.

Whether the Amendment of an indictment after the beginning of the trial to allege a new offense, deprived the accused of the right to be informed of the nature and cause of the accusation and the assistance of counsel contrary to the Sixth Amendment.

II.

Whether the product of an otherwise illegal search and seizure is cleansed of its taint and rendered invulnerable to a motion to suppress for violation of the Fourth Amendment simply because the search and seizure was accomplished by a private investigator who acted in concert with state officials.

III.

Whether the question of consent to validate a search otherwise illegal under the Fourth Amendment is in the first instance a constitutional question to be determined by the Court.

---

[1] All references to amendments indicate Amendments to the Constitution of the United States and any violation of the Fourth or Sixth Amendment shall also be deemed to include a violation of the Fourteenth.

IV.

Whether a jury instruction and a finding of guilty on aiding, abetting and accessory before the fact without any evidence to support the instruction is a violation of Due Process of law contrary to the Fourteenth Amendment.

V.

Whether a quotient verdict to determine the years of sentence deprives the accused of a jury trial in violation of the Sixth Amendment.

VI.

Whether the Trial Court's refusal to permit testimony exculpatory of the accused because the witness was in the court room in violation of the rule excluding witnesses is an abuse of the Trial Court's discretion amounting to a violation of Due Process of law contrary to the Fourteenth Amendment and the Equal Protection clause of that Amendment when a prosecution witness is allowed to testify in violation of the same separation rule.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defense."

Amendment XIV:

"* * * Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person * * * the equal protection of the laws."

Kentucky Statutes.

The relevant Kentucky Statute is:

KRS 227.270: Jurisdiction of department; right of entry for inspections and investigations.

(1) The department shall have jurisdiction over all property in the state insofar as it is necessary for the administration and enforcement of all laws, ordinances, rules and regulations designed to protect the public from fire loss.

(2) The commissioner may at all reasonable hours of the day or night enter in or upon any property to make an inspection or investigation for the purpose of preventing fire loss or determining the origin of any fire, but this subsection shall apply to the interior of private, occupied dwellings only when a fire has occurred therein or when the officer has reason to believe that unsafe fire conditions exist in the building.

(3) No person shall obstruct, hinder or delay such an officer in the performance of his duty.

STATEMENT OF THE CASE.[2]

Petitioner was indicted by the Grand Jury of the Daviess (County) Circuit Court on April 13, 1964. This indictment contained one count charging the offense of "arson" on or about the 18th day of January, 1964

> "by setting fire to and burning the storehouse known as Stone Jewellers * * * said building being owned by one Gabriel Fiorella * * *." 11a. (Transcript of Record 2.)

On September 1, 1964 after twelve jurors had been accepted by both sides and seated, the Commonwealth moved to amend the indictment. The amendment was permitted over defense objection (11a-12a; Transcript of Record 25). The amendment posited a new charge:

> "* * * the above named defendant willfully and maliciously set fire to, burned or caused to be burned, or aided, counselled or procured the burning of a storehouse at 111 West Second Street, in Owensboro, Kentucky, the property of Gabriel Fiorella * * *." (12a; Transcript of Record 28)

After the overruling of his objection the defendant waived formal arraignment on the amended indictment and plead not guilty. *Immediately* thereafter the jury was completed, sworn and the prosecution made an opening statement. Defendant waived opening statement for that time. The taking of Commonwealth evidence began and was continued until 5:40 p.m. when Court adjourned until 7:00 p.m. At 7:00 p.m. the evidence for the Commonwealth continued until 9:40 p.m. All of this transpired on September 1, 1964 (12a; Transcript of Record 27-28). Thereafter, the trial continued from day to day until ver-

---

[2] TE references followed by numbers indicate pages in the Transcript of Evidence.

dict on September 11, 1964 (14a-15a, Transcript of Record 35, 37) under instruction I (14a; Transcript of Record 36). Judgment was pronounced on September 18, 1964 (20a; Transcript of Record 62). The impropriety of the amendment to the indictment was raised again on motion for new trial (16a; Transcript of Record 39) and supplemental motion for new trial (17a; Transcript of Record 44).

The witness, John A. Kennedy, was a private, professional fire and explosion investigator (TE 719). The witness talked with the defendant on January 24, 1964, in the company of Gerald Stewart of the State Arson Bureau (TE 729, 740). Kennedy and the State official concede the defendant was told by Stewart:

> "* * * it is *our* responsibility to try and place responsibility." (TE 914) (emphasis supplied).

Stewart also said:

> "I assure you all the questions *we* ask you and all activities on my part during the course of this inquiry * * * are of routine work." (TE 914) (emphasis supplied).

Thereafter the witness Kennedy went on the burned premises for the third time,[3] removed pieces of charred wood (TE 775-776), took photographs and made observations (TE 792-793).

The defendant denied that consent for the search was ever asked (TE 1222). Kennedy himself testified that the defendant thought he, Kennedy, was an adjuster (TE 884, cf. 1223). At best the reference to anything remotely con-

---

[3] He had trespassed before January 24, 1964, by going on the burned premises on January 22 and 23 (TE 774). The State claimed that Kennedy was an official of the Commonwealth (TE 479-481) and Kennedy himself testified that he was a Deputy State Fire Marshal "at the time I was working on the case of the Stone Jewelry fire" (TE 870-871).

cerning a search and seizure was an indication that responsibility for the fire was to be determined (p.e. TE 914).

The Trial Court did conduct a hearing but did not explicitly determine whether or not the Kennedy search was a consential search as a matter of law (TE 743, 784, cf. 786) but simply ruled that the Kennedy testimony was competent (TE 781, 784). Nor did the Court submit the issue to the jury under instructions (Transcript of Record 35, 40).

Objection to the product of Kennedy's claimed illegal entry was promptly made by motion for voir dire of the witness (20a-23a; TE 743-745), by contesting the issue of consent to the entry on the voir dire (cf. 23a-25a; TE 746-749), and offering contrary evidence through an avowal (26a-27a; TE 783, 784-785). The court overruled the objection to the Kennedy testimony (26a; TE 784). The point was renewed on motion for new trial (15a; Transcript of Record 38) and on Supplemental Motion for new trial (18a-19a; Transcript of Record 45-46).

There was no evidence whatever that the defendant "wilfully and maliciously set fire to, burned or caused to be burned, or aided counseled or procured the burning" (see Instruction No. I, 14a; Transcript of Record 36) of the building in issue here. The defense moved for a directed verdict at the end of State's case and at the conclusion of all evidence (13a; Transcript of Record 32, 34). Yet the Trial Court instructed in those terms. The defense objected and excepted to the instructions (14a; Transcript of Record 35). The objection was renewed on motion for a new trial especially items 5, 6, and 10 (16a; Transcript of Record 39).

The affidavits of three jurors (Transcript of Record 48-50) presented to the Court by a supplementary motion

for a new trial (See Item X 19a; Transcript of Record 47), attested to the fact that the 4 year sentence, a question for the jury under Kentucky law, was a quotient conclusion arrived at by totalling each juror's sentence figure and dividing by twelve.

The State's witness Kennedy testified that it was "probably right, yes" that the smell of accelerants would have been on the second floor (TE 863, 885-886). The trial court refused to permit Randall Aull, the first fireman and only witness who was on the second floor at the time of the fire, to testify (TE 1498). The defense offered the witness's testimony for the record by avowal (TE 1489-1498). That testimony indicates that no "kerosene, gasoline, or any other accelerant" fumes were detected on the second floor.

The exclusion of witnesses rule was in force throughout the trial (20a; TE 19-20). The apparent basis for refusing to allow Mr. Aull's testimony was the fact that he had been in the Court when two other firemen were testifying (28a; TE 1501). Witness Kennedy was also in the court room for the testimony of numerous witnesses. Nevertheless, he was allowed to testify.[4] The point was raised in defendant's Motion and Supplemental Motion for new trial (see Items 15 and VI of those motions respectively, 17a, 19a; Transcript of Record 40, 46).

---

[4] Kennedy was allowed to stay in Court during testimony without objection (TE 19, 20-21). However, this was on the assumption that the usual practice under Kentucky law would be followed, i.e., that the witness sitting with the State would testify first, if at all. This practice was not followed. Kennedy testified after hearing many other witnesses. He was witness No. 15 (see Index to TE iii).

REASONS FOR ALLOWING THE WRIT.

I.

The Amendment of an indictment to allege a new offense after the trial begins deprives the accused of his right to be informed of the nature and cause of the accusation and his right to the assistance of Counsel.

After the trial began, the Trial Court allowed, over objection, the amendment of the indictment to lay a new charge.[5]

Somewhere near the heart of the constitutional right to know the nature and cause of the accusation is the proposition that one charged with crime has a right to insist on sufficient precision in the indictment to enable him to prepare his defense and protect himself against a later prosecution on the same charge. *United States v. Cruickshank,* 92 U.S. 542, 544, 558 (1876). The right to adequate preparation runs into and melds with the right to the assistance of Counsel. And Due Process is offended when Counsel is appointed "generally" for an arraignment, and "specifically," only on the day of the trial because of the necessary limit on preparation and assistance. *Powell v. Alabama,* 287 U.S. 45, 59 (1932):

> "* * * a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."

This Court has held that the right to counsel inheres in Due Process of law as applied to the States through the

---

[5] The Court of Appeals of Kentucky simply found without elaboration that "substantial rights of the defendant were not prejudiced" (3a).

Fourteenth Amendment, *Gideon v. Wainwright,* 372 U.S. 335 (1963); at every critical stage, *Hamilton v. Alabama,* 368 U.S. 52 (1961); *Escobedo v. Illinois,* 378 U.S. 478 (1964); *Miranda v. Arizona,* 384 U.S. 436 (1966).

Much of the Sixth Amendment to the United States Constitution now applies to the States through the Fourteenth. *Gideon v. Wainwright,* id. (Counsel); *Pointer v. Texas,* 380 U.S. 400 (1965) (Confrontation); *Douglas v. Alabama,* 380 U.S. 415 (1965) (Cross-examination as part of confrontation); *Washington v. Texas,* _____ U.S. _____ (1967) 18 L. ed. 1019 (Right to Compulsory Process). Whether such applications are based on a theory of absorption or the notion that such rights are "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), they deserve no higher status than the right of the accused to be informed of the exact nature of the charge in time to avail himself of the effective assistance of counsel. This Court has not decided this precise point although it is implicit, perhaps, in its decisions on Sixth Amendment rights, especially recent ones. Petitioner urges the Court to explicitly declare that the Sixth and Fourteenth Amendments forbid the amendment of a state indictment to propound a new charge after the trial has begun.

II.

The participation of a private investigator in concert with State officials in what is an otherwise illegal search and seizure will not render the product invulnerable to Fourth Amendment attack.

Products of a private investigator's illegal search were admitted into evidence. The evidence is that his activities were in concert with and had the cooperation of state officials (see Statement of the Case).

Receipt of the product of an illegal federal search by non-participating State authorities will not, since *Mapp v. Ohio,* 367 U.S. 643 (1961), rectify illegality and qualify the admissibility of the evidence in a State Court. And before *Mapp,* illegal products of solo State searches and seizures were not admissible in federal trials. *Elkins v. United States,* 364 U.S. 206 (1960). Will illegal State activity be shriven by private participation? Long ago *Burdeau v. McDowell,* 256 U.S. 465 (1921) upheld the admissibility of evidence acquired illegally by private citizens on the ground that the Fourth Amendment had no private application. But *Burdeau* did not involve participation with State officers as in the instant case[6] nor had *Shelley v. Kraemer,* 334 U.S. 1 (1948) been decided. That case inhibits the use of state court process to enforce racially discriminating private agreements on the ground that such use involves state action effecting a denial of Equal Protection of the law. The parallel posed by the concurrence of illegal private action[7] in the present case and the use of state court authority to secure the admission of illegally acquired evidence, albeit private, is obvious.

Should the principle be established that the product of private illegality otherwise within the proscription of the Fourth Amendment can be cured with the assistance of a state court, the policy of the exclusionary rule with its program for shaping police conduct would be open to complete circumvention. The invitation to evasion is the

---

[6] Nor will KRS 227-270 purporting to authorize warrantless searches by state fire officials protect the private participant. Indeed, the constitutional viability of KRS 227-270 is put in doubt by the recent case of *Camara v. Municipal Court,* 387 U. S. 523 (1967) 18 L. ed. 930 where a conviction for refusing officials access for inspection under an ordinance allowing warrantless inspection was reversed.

[7] Even had the witness Kennedy acted without the state auspice he obviously enjoyed.

more obvious in the present case because of the close concert of official and private activity. This Court has the occasion here to decide this point or points and reinforce the proposition that official action cannot by indirection subvert the policy of the law.

III.

The refusal of the Trial Court to make the initial determination whether defendant's consent validated the product of a search (otherwise infirm under the Fourth Amendment) is a denial of Due Process.

The trial judge did not, after hearing, decide the consential question nor did he submit it to the jury under proper instructions or any instructions at all. (Transcript of Record 36-37.)

Upon the analogy to the principle of *Jackson v. Denno,* 378 U.S. 368 (1964), Due Process entitles the defendant to an independent examination and determination of the consential question by the Trial Court before it is submitted to the jury. This was not done here and this Court has never decided whether as a matter of constitutional right it should have been done.

IV.

The instructing of a jury on an issue not supported by evidence with a resultant conviction exposes the accused to a conviction without Due Process of law.

It is well settled that a conviction without evidence offends Due Process of law, *Thompson v. Louisville,* 362 U.S. 199 (1960). In the instant case there was no evidence whatever connecting the defendant with any of the actions described in Instruction I (which the jury assigned as the basis of its verdict, 15a) unless it be that defendant owned

the business operated in the leased property destroyed by fire. Conviction on such evidence offends Due Process of law. A grant of the writ will enable the court to conform the procedure in the present and future cases to the maximum constitutional standards long established and reiterated in the *Thompson* case.

V.

Where, under local law, the years of sentence are a matter for the Jury, the accused is deprived of a jury trial in violation of the Sixth and Fourteenth Amendments when the number of years is determined by a quotient verdict.

This Court has not held specifically that the Sixth Amendment right to a jury trial is to be applied to the states through the Due Process Clause of the Fourteenth. Nevertheless, most of the rights encompassed by the Sixth now regulate state conduct by virtue of the Fourteenth Amendment (see discussion under I above). The vice of a quotient verdict lies in an accompanying agreement to be bound by the quotient. Cf. *Lund v. Kline,* 133 Ohio St. 317, 13 N.E. 2d 575, 576 (1938). Such agreement by the jurors abdicates judgment and results in *no* trial by jury.

Prior agreement is evident in the present case from the affidavits of three jurors which specifically recite the agreement (Transcript of Record 48-51).[8] This evidence is contradicted only in part by a subsequent affidavit signed jointly by all jurors except Guy Harrison (Transcript of Record 51-53), one of the original affiants who did not sign (Transcript of Record 53).

---

[8] Kentucky Rules of Criminal Procedure, Rule 10.04 *Examination of Jurors after Verdict.* A juror cannot be examined to establish a ground for a new trial, *except to establish* that the verdict was made by lot. (Emphasis supplied.)

Petitioner requests the Court grant the petition for certiorari to determine whether to apply the right to trial by jury to state proceedings by application of the Fourteenth Amendment and to determine whether the jury trial in this case met constitutional standards.

VI.

The Trial Court's application of the exclusion of witnesses rule to (1) allow testimony inculpating the accused and (2) refuse testimony exculpating him constituted an abuse of discretion in violation of both the Due Process and Equal Protection provisions of the Fourteenth Amendment.

The Trial Court refused to allow testimony from Fireman Randall Aull[9] that he did not detect accelerant fumes on the second floor of the building whose burning is the occasion for the charge against the accused. Apparently, the basis for the ruling was the exclusion of witnesses rule. Expert witness Kennedy for the State had indicated that if accelerants were present there would be fumes on the second floor.

The effect of the refusal of the Aull testimony was double. First, it effectively suppressed material, which, taken with Kennedy's, would have had an exculpatory effect. Second, allowing prosecution testimony in violation of the rule, and refusing Aull's testimony because of it, resulted in an invidious discrimination.

Although this Court has not applied the principle of *Brady v. Maryland*, 373 U.S. 83 (1963), in these precise circumstances the logic of the principle extends here. See

---

[9] Aull was the only witness (TE 1498) on the second floor of the building at the crucial time. See Statement of the Case, *supra*. The importance of his testimony to the case was not discovered until after two fellow firemen had testified. Aull heard them only by chance (TE 1490; 1498).

also *Giles v. Maryland*, ____ U.S. ____, 17 L.ed. 2d 737 (1967). Similarly, the reach of the logic in the Equal Protection cases, see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), governs and prohibits the "unequal hand" evident in the *opposite* applications of the witness exclusion rule in this case. In generically identical situations it is fundamental that both parties to litigation are entitled to equal procedural treatment.

The writ should be granted to further delineate the constitutional applications of the principles asserted here.

CONCLUSION.

This case illustrates the need for constant watchfulness and exposition of constitutional principles. Here either misapprehension or gross misapplication of settled principles threatens to defeat this Court's concern for Due Process and Equal Protection for persons accused of crime. The writ should issue to protect the principles and the petitioner.

Respectfully submitted,

JACK G. DAY,
1748 Standard Building,
Cleveland, Ohio 44113,

WILLIAM E. RUMMAGE,
Masonic Building,
Owensboro, Kentucky 42301,
Counsel for Petitioner.

APPENDIX

APPENDIX.

OPINION OF THE COURT OF APPEALS OF KENTUCKY BY JUDGE HILL, AFFIRMING.

(Rendered: February 17, 1967.)

Appellant was convicted and sentenced to four years in prison under an indictment charging him with maliciously burning a store building, denounced by KRS 433.020.

We go directly into the numerous questions relied on by appellant for reversal after stating the following salient facts about which there is no dispute. The fire occurred January 18, 1964, in a two-story building, which appellant did not own but the first floor of which was rented and in use by appellant in connection with a retail jewelry business. Appellant left the store about 5:00 p.m., and the fire was discovered approximately thirty minutes later. He was in debt; his business was not thriving; and he had obtained a large insurance policy on his merchandise two months previous to the fire.

First it is insisted by appellant that the court should have instructed the jury on the question of whether appellant consented to the search of the ruined premises. John A. Kennedy, a private investigator for Allstate Insurance Company, appellant's insurer, testified appellant consented to his inspection of the premises after the fire. This is denied by appellant. It is argued that the rule in *Mattingly v. Commonwealth*, 202 Ky. 343, 259 S.W. 710, required the submission of this question to the jury. We find no fault with the rule in *Mattingly;* but for reasons to be later discussed herein in connection with the nice constitutional question of evidence obtained by a private citizen as distinguished from evidence obtained by an officer of the law, it will not be necessary to apply the rule in *Mattingly*.

Assigned as error was the failure of the trial court to allow Randall Aull to testify for appellant. This witness admitted he was in the courtroom at the time two of his fellow firemen testified on behalf of the Commonwealth. An order authorized by CR 43.09 was duly entered providing for the exclusion of the witnesses from the courtroom. This section of the Rules, as well as its predecessor 601 of the previous Code, has been uniformly construed to give the trial judge a broad discretion in the matter of permitting or refusing to permit a witness to testify who has violated the rule. See *Murphy v. Phelps,* 241 Ky. 339, 43 S.W. 2d 1010, and 88 *C.J.S.,* Trials, section 65.

The avowal of the witness Aull indicated he was the only one of the three firemen who reached the second floor, where the Commonwealth's witnesses inferred "accelerant" fumes must have emanated from. Aull's avowal stated he did not smell fumes from the second floor window, but he said he "didn't stay too long because the smoke came bellowing out then," and "Captain Freeman hollered and told" him "to come off the ladder." This testimony has a slight tendency to contradict the negative testimony of his two fellow firemen, who said they did not notice fumes. But the nature of Aull's testimony was not so vital or convincing as to require the trial court to allow it. Certainly, we cannot say the trial judge abused his discretion. In any event, the order for exclusion was violated, and it was within the sound discretion of the trial court to allow or not permit the witness to testify.

Next appellant contends the court erred in allowing the introduction by the Commonwealth of certain photographs and "charred wood." Appellant moved for the production by the Commonwealth of all photographs and articles to be used on the trial pursuant to the provisions of RCr 7.24. The Commonwealth did produce a number

of articles and some photographs, but the "charred wood" was at that time enroute to or from Chicago, Illinois, for testing and was not delivered to attorney for appellant. In fact, these items were in the possession of Allstate Insurance Company and its agent. Appellant, himself, authorized Allstate to take possession of the "charred wood," although he denied this at the trial. In any event, appellant had the right under RCr 7.04 for the production of these articles. Furthermore, it cannot be said that the articles desired by appellant "were in possession of" the Commonwealth at the time the motion was made under RCr 7.24.

Complaint is made of the ruling of the trial court, after the jury was empanelled and sworn, allowing the Commonwealth to amend the indictment. The original indictment charged appellant with "setting fire to and burning the storehouse known as Stone Jewelers" and listed KRS 433.020. The amendment added the following charge: That he "aided, counselled or procured the burning of a storehouse," and again cited the statute.

An indictment may be amended under RCr 6.16 "any time before verdict" providing "the substantial rights of the defendant are not prejudiced." Instruction number one followed the language of the statute, and the verdict found appellant guilty under instruction one. In our view, the substantial rights of the defendant were not prejudiced by the amendment. See *Brown v. Commonwealth*, Ky., 378 S.W. 2d 608 (1964) and *Hines v. Commonwealth*, Ky., 390 S.W. 2d 152 (1965).

This brings us to the fifth error assigned by appellant, in which he contends all the testimony of the witness John A. Kennedy should not have been admitted for the reason Kennedy searched his premises without his consent and without a search warrant.

The Commonwealth counters to this argument by saying, first, Kennedy got the evidence by "consent" of appellant; second, by taking the untenable position that appellant had no possession of the premises after the fire, and that the possession reverted to appellant's landlord; and third, that Kennedy, being a representative of Allstate, was a "private individual," and evidence obtained by him as a private citizen does not violate section ten of the Constitution of Kentucky or the fourth amendment to the Constitution of the United States.

The first part of the Commonwealth's counter argument will be answered in the discussion of the third argument. The second counter argument, relative to possession of the wrecked and charred building, is without merit. It is sufficient to say that appellant had possession at least for a reasonable time to enable him to recover any property not destroyed by fire. He may have had possession for as long as the rent was paid or until a new building could be constructed.

The third counter argument is one that may have merit. But in this jurisdiction, and in many others, evidence obtained by private individuals by search or observation has not been excluded under section ten of our Constitution and the fourth amendment to the Constitution of the United States. See *Chapman v. Commonwealth,* 206 Ky. 439, 267 S. W. 181, from which we quote:

> "It has often been written that that section (10) was directed at the sovereignty, acting through its public officers; and the evidence thus disclosed to public officers in an illegal search or seizure has been declared incompetent against the defendant to the end that the constitutional provision may be made more effectual than if he was left alone to his remedy in trespass against the officer. It has never been held, however, to embrace or be applicable to a private

> individual who, through a process of spying or other form of trespass, discloses evidence against another. Manifestly as against such private individual the aggrieved party is left to his remedy in trespass."

The rule above discussed is treated in 50 *A.L.R.* 2d, p. 571, in this manner:

> "The exclusionary rule stated in section 7 (a), supra, under which evidence obtained by an unlawful search and seizure is not admissible against an accused, has been held not to apply where the unlawful search was made by a private individual acting on his own initiative."

Cases cited under the foregoing section of *A.L.R.* include those in California, Mississippi, Missouri, Oregon, the United States in *Burdeau v. McDowell,* 256 U.S. 465, 65 L.Ed. 1048 (1921), and our own state of Kentucky.

Also in 16 *Am. Jur.* 2d, Constitutional Law, section 557, p. 960, it is written:

> "It is the established general rule that the provisions of the due process clause in a state constitution and in the Federal Constitution are inhibitions upon the power of government and its agencies, not upon freedom of action of private persons."

This jurisdiction has continued to follow *Chapman, supra,* in *Gilliam v. Commonwealth,* 92 S.W. 2d 346, and in many other cases. See also the recent case of *United States v. Goldberg,* 330 Fed. 2d 30 (1964), certiorari denied July 1, 1964. We can discern nothing at present or on the horizon to justify a departure from the sound constitutional law announced in *Chapman, supra,* and later cases. It is without reluctance that we follow that rule.

Appellant contends he is entitled to a reversal for failure of the trial court to sustain his motion for a new trial on the ground the jury reached its verdict by lot.

Appellant filed affidavits of three of the jurors; the Commonwealth filed affidavits of eleven of the jurors. Appellant's affidavits did not fix the time at which each juror submitted on separate slips of paper his preference for the length of term of the sentence. The affidavits for the Commonwealth showed the balloting did not take place until all twelve jurors had voted unanimously that appellant was guilty as charged. This did not amount to a quotient verdict. See *Cox v. Commonwealth*, 255 Ky. 391, 74 S.W. 2d 346, and *Graham v. Commonwealth*, 221 S.W. 2d 677, wherein it is said:

> "This method in arriving at verdicts has been repeatedly condemned by us. However, where it appears, as in the instant case, that the jury unanimously agreed upon the guilt of the accused and then arrived at a quotient verdict which was subsequently and independently adopted by all members of the jury, we have written that the verdict was not one by lot within the meaning of section 271(3) of the Criminal Code of Practice."

The next question raised by appellant involves the sufficiency of the evidence to convict. He maintains he was entitled to a directed verdict. Here it is necessary to state facts established by the evidence. Appellant's own brief summarizes the evidence substantially. We quote therefrom:

> "(1) That there was a fire at about 5:30 on January 18, 1964, which subsequently consumed the building and contents of Stone Jewelry Store.
>
> "(2) That the appellant had the opportunity to set the fire.
>
> "(3) That he could have been there when the fire started.
>
> "(4) That there was an accelerant used on the fire.

"(5) That the appellant was on a cash basis with suppliers.

"(6) That he had recently taken out a substantial insurance policy with Allstate Insurance Company covering the contents and improvements.

"(7) That the appellant owed a substantial sum of money, although he had a good many assets, and had been sued on a number of accounts.

"(8) That if the appellant did not set the fire, he could have known who did set it."

To this list we may add that the evidence for the Commonwealth described the difference between the burning process on wood where an accelerant was present and that resulting from natural burning and the difference in the coloration of charred wood by burning due to accelerant and that resulting from burning without it. A witness with vast experience, covering a period of more than twenty years, from the holocaust at Hiroshima to the present time, gave convincing evidence that the building was set afire at three separate places. He explained that some of the fire "burned down," indicating that the flames followed a liquid accelerant as it ran through the floor cracks and down the walls, and that natural fire always burns upward from the starting point.

It is concluded the trial court properly submitted the issue to the jury. *Hines v. Commonwealth*, Ky., 390 S.W. 2d 152 (1965). *Baker v. Commonwealth*, Ky., 307 S.W. 2d 773 (1957).

Appellant's motion for change of venue was overruled. He contends this was error. KRS 452.220 outlines the procedure for obtaining a change of venue. It states:

"(2) If the application is made by the defendant, it shall be made by petition in writing, verified by the defendant, and by filing of the affidavits of at least

two other credible persons, not kin to or of counsel for the defendant, stating that they are acquainted with the state of public opinion in the county objected to, and that they verily believe the statements of the petition for the change of venue are true."

The petition was not verified, nor was it sufficient. It is copied herewith.

"Comes the defendants and each of them and move the court for the changing of the venue for the prosecution and trial of these actions and each of them. In support of this motion there is attached hereto the affidavits of J. J. Taylor and Parvin Hidenrite."

(Signed by attorney for appellant.)

The affidavits referred to in the petition stated only conclusions; they referred to unfavorable news media but did not state any facts in connection therewith. The petition, including the affidavits, was utterly insufficient to require or justify a change of venue. See *Brunner v. Commonwealth*, Ky., 395 S.W. 2d 382 (1965), *White v. Commonwealth*, Ky., 394 S.W. 2d 770 (1965). Appellant contends that the affidavits filed by the Commonwealth were too late; that they were filed after the court ruled on his petition for change of venue. It is not clear whether the court undertook to allow the Commonwealth to file counter affidavits after its ruling and considered what the Commonwealth announced it would include in the affidavits, but it is unnecessary to decide this question since we have concluded the petition was not sufficient.

Objection is made to the ruling of the trial court in allowing the witnesses Gillingham and Phillips, state arson detectives, to testify after it was shown they did not visit the scene of the fire for thirty days after the fire. It is

urged that KRS 227.270 (authorizing investigation of fires) is unconstitutional and that the testimony of these two witnesses is too remote due to a change in condition of the premises.

The remoteness of the inspection goes to the credibility and weight to be given to their evidence.

The investigation of fires is clearly a proper exercise of the police powers of the State. We have no difficulty in concluding that KRS 227.270 is constitutional and does not violate either the fourth, fifth, or fourteenth amendments of the Federal Constitution or section ten of the Constitution of Kentucky. See *City of Louisville v. Thompson*, Ky., 339 S.W. 2d 869, and *Moore v. Ward*, Ky., 377 S.W. 2d 881.

The final question raised by appellant concerns the ruling of the trial court in excusing the prospective juror Alexander who stated on voir dire he had been a close personal friend of appellant for thirty-five years, although he thought he could give both sides a fair and impartial trial. A trial judge is given broad discretion by RCr 9.36 to excuse a prospective juror for cause. See *Carson v. Commonwealth*, Ky., 382 S.W. 2d 85. It is concluded the trial court was amply justified in excusing this juror.

The judgment is affirmed.

Williams, C.J., and Milliken, Montgomery, Osborne, and Steinfeld, JJ., concur.

Palmore, J., dissents.

DISSENTING OPINION BY JUDGE PALMORE.

(Rendered: February 17, 1967.)

I dissent from that portion of the opinion which holds that the constitutional protection against unreasonable search and seizure is of no avail if the search was conducted by a private citizen not acting at the instance of an officer or agency of the state. When the state condones an illegal search by using its fruits in a criminal prosecution it becomes an accessory, and bears the ultimate responsibility for depriving the offended person of that which Const. § 10 and the Due Process Clause of the 14th Amendment to the Constitution of the United States have guaranteed him. If only in this small way, I am proud to join the company of Brandeis and Holmes. Cf. dissenting opinion of Mr. Justice Brandeis in *Burdeau v. McDowell*, 256 U.S. 465, 65 L. ed. 1948, 41 S. Ct. 574, 13 *A.L.R.* 1159 (1921).

ORDER OF THE COURT OF APPEALS OF KENTUCKY.

(Issued October 13, 1967.)

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

Dissenting Opinion by Judge John S. Palmore.

DREXELL R. DAVIS, C. C. A.
By JOHN C. SCOTT, C. D. C.

DOCKET ENTRY OF COURT OF APPEALS OF KENTUCKY ON REHEARING.

Petition for Rehearing Overruled, Oct. 13, 1967.

RELEVANT EXCERPTS FROM TRANSCRIPT OF RECORD.

(2) Indictment.

The Grand Jury charges:

That on or about the 18th day of January, 1964, in Daviess County, Kentucky, the above named defendant committed arson by setting fire to and burning the storehouse known as Stone Jewelers located at 111 West Second Street, Owensboro, Kentucky, said building being owned by Gabriel Fiorella, against the peace and dignity of the Commonwealth of Kentucky.

* * * * *

(25) At 1:00 P.M. CDT, Court reconvened, came the Attorney for the Commonwealth and the defendant being in Court, and represented by his counsel, William E. Rummage, the 12 jurors heretofore accepted by the Commonwealth and the defendant were seated in the Jury Box, viz: Joe Mullican, Golden Acton, Guy Harrison, J. B. Thompson, Sr., Roby Robertson, O. F. McEuen, Joe Heady, James A. Abel, Wm. A. Leonard, Martin Bresler, Mark Mattingly and William R. Cavin.

Thereupon, the Court, Attorney for the Commonwealth and counsel for the defendant retired to Chambers. The Attorney for the Commonwealth tendered and moved the Court to file an Amended Indictment herein, to which motion the defendant objected, and the Court being advised, overruled said objection, and sustained the motion of the Commonwealth, and it is now ordered by the Court

that said Amended Indictment be, and it is, filed, to which ruling of the Court the defendant objects and excepts.

Whereupon, the defendant demurred to the Amended Indictment, and counsel for the defendant informing the Court that he did not desire to be heard thereon, the Court overruled same, to which ruling of the Court the defendant excepts and objects.

* * * * *

(27) Thereupon, the evidence in behalf of the Commonwealth was begun and continued until 5:40 P.M. CDT, at which time the Court admonished the jury as to their duties and adjourned them until 7:00 P.M. CDT.

(28) At 7:00 P.M. CDT, Court reconvened, came the jury heretofore sworn herein, and the defendant being in Court, the evidence for the Commonwealth was resumed and continued until 9:40 P.M. CDT, at which time the Court admonished the jury relative to their duties and adjourned them until tomorrow morning at 9:30 o'clock.

* * * * *

Indictment as Amended Pursuant to Motion of Commonwealth on September 1, 1964.

The grand jury charges that on the 18th day of January, 1964, in Daviess County, Kentucky, the above named defendant willfully and maliciously set fire to, burned or caused to be burned, or aided, counselled or procured the burning of a storehouse at 111 West Second Street, in Owensboro, Ky., the property of Gabriel Fiorella, against the peace and dignity of the Commonwealth of Kentucky.

* * * * *

(32) Order.

(September 8, 1964.)

* * * * *

At the conclusion of the introduction of evidence for the Commonwealth, came the defendant, by and through his counsel, William E. Rummage, and moved the Court to peremptorily instruct the jury to find him not guilty, to which motion the Commonwealth interposed an objection, and the Court sustained the Commonwealth's objection thereto, and overruled the defendant's aforesaid motion for a peremptory instruction, to which ruling of the Court the defendant excepted.

* * * * *

(34) At the conclusion of the introduction of the evidence in behalf of the defendant, came the defendant, by and through his counsel, William E. Rummage, and moved the Court to peremptorily instruct the jury to find him not guilty, to which motion the Commonwealth interposed an objection, and the Court sustained the Commonwealth's objection thereto, and overruled defendant's aforesaid motion for a peremptory instruction, to which ruling of the Court the defendant excepted.

* * * * *

At the conclusion of the introduction of all the evidence in this prosecution, came the defendant, by and through his attorney, William E. Rummage, and moved the Court to peremptorily instruct the jury to find him not guilty, to which motion the Commonwealth objected, and the Court sustained the Commonwealth's objection thereto, and overruled defendant's aforesaid motion for a peremptory instruction, to which ruling of the Court the defendant excepted.

* * * * *

(35) Order.

(September 11, 1964.)

* * * * *

Thereupon, the Court instructed the jury as in its Instructions Numbered I, II and III, to the giving of which, and each of which, the defendant objected and excepted, and moved the Court to instruct the jury on the whole law of the case, including a proper instruction to the jury as to whether or not the defendant, Bernes B. Stone, waived his rights to the Fourth Amendment of the United States Constitution in consenting to the search of his premises by the witness, John A. Kennedy, and the Court declined to instruct further than as herein indicated, to which ruling of the Court the defendant objected and excepted. Said Instructions were ordered to be, and were, filed, and made a part of the record herein.

* * * * *

(36) Court's Instructions.

I.

If the Jury believe from the evidence in this case, beyond a reasonable doubt, that in Daviess County, Kentucky, and on January 18, 1964, before the finding of the indictment herein, the Defendant, Bernis B. Stone, wilfully and maliciously set fire to, burned or caused to be burned, or aided, counseled or procured the burning of a store-building owned by Gabriel Fiorella at 111 West Second Street in Owensboro, Kentucky, then you will find the Defendant guilty as charged in the indictment and fix his punishment at confinement in the penitentiary for not less than one (1) year nor more than ten (10) years, in your discretion.

II.

If the Jury have a reasonable doubt of the Defendant, Bernis B. Stone, having been proved guilty, you will find him not guilty.

* * * * *

(37) Verdict.

"We, the jury, find the Defendant, Bernis B. Stone, guilty under Instruction I and fix the punishment at 4 years.

ROBY ROBERTSON
Foreman"

(38) Order.

(September 11, 1964.)

Came the defendant, Bernes B. Stone, by and through his attorney, William E. Rummage, and filed his written motion herein, and pursuant thereto, moved the Court to grant him a new trial pursuant to CRc 10.02 for the reasons set forth therein, to which motion the Commonwealth interposed an objection.

* * * * *

Motion for New Trial.

(Filed Sept. 11, 1964.)

Comes the defendant, Bernis Stone, by and through counsel, and moves the court to grant him a new trial pursuant to Criminal Rule 10.02 for the following reasons:

* * * * *

3. The court was in error in allowing John A. Kennedy to testify because permission was never granted to him to go upon the premises by the defendant.

4. That the evidence was without probative value and failed to establish the guilt of the defendant beyond a reasonable doubt.

(39) 5. That the court should have sustained defendant's motion for a directed verdict and in failing to do so, left up to the jury determination of questions of law, contrary to and in violation of defendant's right to a fair and impartial trial, and with due process of law.

6. It was error on the part of the court to overrule the motion to dismiss the indictment insofar as these counts are concerned, and said motion should have been sustained.

* * * * *

8. The court erred in excluding evidence offered by the defendant and particularly the court erred in excluding the evidence of Randall Aull.

9. The court erred in refusing to peremptorily instruct the jury and to direct the jury to return a verdict of not guilty at the end of the evidence presented by the Commonwealth at the conclusion of the evidence presented by the defendant and before the rendering of the instructions given by the court, and this refusal operated to the serious prejudice of the defendant.

10. The instructions given by the court were clearly improper, did not reflect the offenses alleged in the indictment and were drawn so as to render it impossible to determine just what offense described in an indictment was covered by a particular instruction, all of which operated to the serious prejudice of the defendant.

* * * * *

(40) 12. The court left up to the jury the determination of questions of law contrary to and in violation of the defendant's right to a fair and impartial trial, and thus denied the defendant due process of law.

13. The court refused to instruct the jury upon the whole law of the case contrary to the rights of the defendant and over the objections of the defendant.

14. The instructions given by the court were greatly improper, did not present the affirmative defenses of the defendant and failed to present the question of the competency of John A. Kennedy evidence for the jury.

15. The court erred in allowing John A. Kennedy in the courtroom and hear evidence presented prior to the time he took the witness stand it being the contention of the defendant that if the said John A. Kennedy were permitted to remain in the courtroom he should have been required to testify as the first witness for the Commonwealth.

* * * * *

(44) Supplemental Motion and Grounds for New Trial.

Comes the defendant, Bernes B. Stone, by and through counsel, and hereby amends his motion for a new trial and hereby presents additional grounds for a new trial pursuant to Criminal Rule 10.02, as follows:

I.

The Court erred in overruling defendants demurrer to the indictment.

* * * * *

(45) V.

The Court erred in permitting the witness, John A. Kennedy, to testify at all in this case for the following reasons:

(a) The defendant at no time waived his rights pursuant to the 4th Amendment of the United States Constitution or Section 10 of the Kentucky Constitution and therefore, the search of the defendant's premises by the witness Kennedy was in violation of the defendant's constitutional rights pursuant to the above mentioned constitutional provisions.

(b) The witness Kennedy admitted on the witness stand that he took from the defendant and his premises, at 111 West Second Street, Owensboro, Kentucky, after a search and seizure of the defendants property certain objects, tangible in matter, to-wit:. Boards and scrappings and returned to his office in Chicago, Illinois, where the Phoenix Laboratories made chemical analysis from said boards and scrappings. That the defendant prior to the trial, on the -- day of June, 1964, moved this Court pursuant to Criminal Rule 7.22 for an order ordering the commonwealth's attorney to permit the defendant and/or his attorney to inspect and/or copy and/or photograph all books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure and/or process. This motion was sustained by the Court and the Court ordered that on the ---- day of July, 1964, the Commonwealth produce for the defendant and his attorneys inspection all books, papers, documents, or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process. That the Commonwealth has to this day failed and refused to produce (46) either the wood or scrappings or anything else taken from the defendants premises, at 111 West Second Street, Owensboro, Kentucky. That to permit the witness Kennedy to testify about his findings in regard to these objects taken from the defendant in this situation makes a mockery of Criminal Rule 7.22.

(c) That the witness Kennedy admitted that he was on the premises of the defendant, at 111 West Second Street, on two occasions before he received any "permission" to go on the property from Mr. Stone and under no circumstances could it have been proper for the witness Kennedy to be allowed to testify and within his sole dis-

cretion decide what information he would tell the jury or what objects he would tell the jury were secured before the alleged "permission" while he was a trespasser and a larcenist.

VI.

The Court erred in permitting the flagrant violation of the Rule of separation of witnesses (and the keeping of said witnesses out of the presence and hearing of the witnesses testifying), which Rule was invoked by the Court after joint motion of the Commonwealth and the defendant, through their attorneys. After the said Rule was invoked the Court permitted the star Commonwealth witness Kennedy to sit in the Courtroom and hear numerous witnesses testify and then get on the witness stand and testify himself. That it was the duty of the Commonwealth to place the witness Kennedy on the stand as its first witness if it intended to use him at all. That their failure to put him on the witness stand as their first witness, prohibited him from testifying at all.

* * * * *

(47) X.

That the Jury reached its verdict by lot, which is an illegal verdict and is void in every sense. In support of this contention in this paragraph and as a support of this ground for a new trial, there is attached hereto affidavits of jurors Guy Harrison, Golden Acton, and Hugo Zobjeck.

Filed Sept. 15, 1964.

Attest:

JAMES W. CLAYTON, *Clerk.*
BY: MINTA FUERST, D. C.

* * * * *

(62) Judgment.

September 18, 1964

The defendant, Bernes B. Stone, being in Court and being informed by the Court of the nature of the indictment against him herein as well as his plea and the verdict of the jury in this prosecution and being asked by the Court if he had any legal reason to show why the judgment of the Court should not be rendered upon said verdict and none being shown; it is now adjudged by the Court that the defendant, Bernes B. Stone, be taken hence to the Jail of Daviess County and that he be there confined until such time as the Sheriff of this County can convey him to the Penitentiary and that he be then taken by said Sheriff to the Kentucky State Penitentiary at Eddyville, Kentucky, and that he be there confined at hard labor for the period of FOUR (4) YEARS.

* * * * *

RELEVANT EXCERPTS FROM TRANSCRIPT OF EVIDENCE.

* * * * *

(19) The Rule was requested by both the defense and **(20)** the Commonwealth, and the Court invoked the Rule as requested.

* * * * *

(743) (The following conference in chambers:

(The Court heard arguments of counsel, then the following:

Mr. Rummage: Came the Defendant and moved the Court to hear evidence in chambers from various witnesses in regard to the extension of the consent, if any, given by the Defendant to the witness John Kennedy in

January, 1964, whereby he allegedly waived his right to the Fourth Amendment of the Constitution.

The Defendant contends that it is not a question of fact here presented but a question of law for the Court to determine whether or not the Defendant in this instance waived his rights under the Fourth Amendment to the United States Constitution.

The Defendant would further like to point out that in view of the Court's ruling the only ruling that the Defendant will have, even if the evidence proves incompetent, the search provision incompetent, is for the Defendant to appeal, for the jury will have heard the evidence.

Let it further appear that the Defendant offered the witness, "Robert M. Short and Defendant, B. B. Stone, to testify in chambers in regard to the facts and circumstances surrounding the alleged consent given by the Defendant to the witness, John Kennedy, to search the premises at 111 West Second Street, Owensboro, Kentucky, and the Court (744) refused to hear evidence in regard to this matter.

The Court: This is but another of many, many hearings that have been held. The Court will point out that I have been informed that the witness, Kennedy, will in continuation of his testimony state that on January 24th, 1964, after he informed the Defendant, B. B. Stone, as to who he was and the purpose of his being in Owensboro that he was an arson investigator, that he received personal permission from B. B. Stone to go upon the premises in question. It's with this supposition that the Court is making the following observations and rules:

There has been a number of search approaches, as the Court will see from earlier examination of this record. The first of the questions started with the witness, Joe Mitchell. The Court ruled on Joe Mitchell that Stone had

given the witness Mitchell express permission to go upon the premises.

The Commonwealth next sought to bring other witnesses in under the ruling of the Zapp case. The Court then ruled that the Zapp case was not applicable and that they could not get him in under that ruling.

The next effort by the Commonwealth was to bring them in under what they contended was the broad invitation extended to the witness Joe Mitchell.

On the Commonwealth evidence in this instance the (745) Court could not agree with them that the invitation given to Mitchell would cover others who came some three, four, five days later, whatever the evidence might be.

Now as the Court understands it the Commonwealth is by the witness, John A. Kennedy, prepared to prove that after the conversation with the Defendant, B. B. Stone, at which time Mr. Kennedy informed him who he was, what he was, the purpose of his being in Owensboro, what he sought to do and all that, the Defendant, B. B. Stone, gave him personal permission to go upon the premises. If the testimony is of this character the Court can see no difference in this situation and the situation that is previously ruled on with reference to the witness, Joe Mitchell.

The Court will point out that another abortive effort on the part of the Commonwealth was to introduce the witness Kennedy as a deputy fire marshal of the Commonwealth of Kentucky which they did not pursue.

The efforts outlined above comprise the various facets followed to introduce the witness Kennedy.

Mr. Rummage: Comes the Defendant and moves the Court to take the testimony of the witness, John Kennedy, in chambers on voir dire on the sole question of determin-

ing the circumstances and details in regard to the alleged waiver by the Defendant of his rights under the Fourth Amendment to the United States Constitution.

(746) The Court: All right, the Court will—

Mr. Gant: Object to that.

Thereupon Witness, JOHN A. KENNEDY, came into chambers and the following took place:

Mr. Rummage: Your Honor, I thought that—this is my motion and I'm to—

The Court: This is his witness, then when he is through you can—

Mr. Rummage: I think that's improper. I want to object for the record, I should have him first. This is my motion, not youall's.

The Court: Show this is in chambers—

Mr. Rummage: This is—

Reporter: I can't get all—

The Court: All right.

Mr. Gant: Mr. Kennedy, let me ask you if—

Mr. Rummage: Excuse me, Billy,—The Defendant objects to the ruling of the Court authorizing the Commonwealth to ask this witness questions.

Mr. Gant: Well, as I understood it's an objection to what I intend to ask him, and I—well, I thought I would put on what I intend to ask him.

Mr. Rummage: No. Your Honor, the purpose of this is to determine—

Mr. Stubblefield: There's no objection to what he's said so far— (both talking)

(747) Mr. Rummage: Whether or not his evidence—

Reporter: Judge, not both at once, please.

Mr. Rummage: Well, I don't want it down. This is—the purpose of this is to determine whether or not his evidence is admissible, and that's a question for the Court.

The Court: All right, let's—what you have stated you just want to hear what he has to say anyhow.

Mr. Gant: But the Court has ruled that there is no improper answers so far. (both talking)

The Court: There's nothing improper. We're going to have him ask him the next question to put the issue before the Court so we can see what the situation is. Up to now, there has been no objection to anything—

Mr. Rummage: I don't want to prolong it—

The Court: In the record to the present time.

Mr. Rummage: Yes, sir.

The Court: All right, go forward.

AVOWAL.

Came the Witness, JOHN A. KENNEDY, in chambers, out of the hearing and presence of the Jury, and avowed as follows:

By Mr. Gant:

Q.1 Well, since it's in chambers, Mr. Kennedy, I'll ask you to read the transcript and the statement that was made to him on the bottom of page 35, Number 199.

(748) Mr. Rummage: Object unless the whole thing's read.

Mr. Gant: Now, this is in chambers, Your Honor—

The Court: Yes—

Mr. Gant: Again—

The Court: All right.

Mr. Gant: I—I will put the whole thing on.

Mr. Rummage: Object and—do you overrule the objection?

The Court: Yes, Mr. Gant has the right to put on what he wants to put on, then you can put on what you want to put on. And we'll reach a decision.

Mr. Rummage: Exception.

The Court: All right.

Mr. Gant: Q.2. Go ahead and read it, Mr. Kennedy.

A. "We, generally, when we conduct an investigation as to determine what happened in an unknown fire, we go right to the assured, which is you, and put all our cards on the table, and you prefer it that way and we do too. Nothing in this, as the Deputy Fire Marshal said, is any infers that you were at fault, or there was anything wrong or laid on the line, however, we will conduct and attempt to determine what happened, if it were, in this instance, to find that there was a fire of incendiary origin, we would attempt to determine who might have done it. We always look to the building owner and the occupant immediately and make investigations, which are normal. It would be silly to tell (749) you that we didn't do that, because we sure do. You, we may find out that this was an accidental fire or a natural fire, and we may never find out, but that is why we are making this inquiry. Also, as you, and I think it is easier to lay our cards on the table and discuss it, in a case where an occupant has a fire we are interested in the financial background of the individual. For instance, a lot of people are in financial difficulties and if they have a fire, it may have nothing whatsoever to do with it, but I would like to ask you, we are going to attempt to get a financial profile on you and background and if you will assist us in compiling it. We wanted to show that you did or did not have, what your financial condition was, whether it was possible might relate to your financial condition."

Q.3. All right, sir. Now, I'll ask you if that statement was made to Mr. Stone, and he was there at the time it was made?

A. Yes, sir, it was, and Mr. Stone was there.

Q.4. Now, after that statement was made on that date, at any time, did he give you permission to go on the property?

A. Yes, sir, he did.

Mr. Gant: That's all I care to ask.

* * * * *

(783) Mr. Rummage: Comes the Defendant at this time and moved the Court to place the witness, Robert Short, on the witness stand in chambers for the purpose of testifying as to what consent was given by Mr. Bernis B. Stone on the 24th day of January, 1964, if any, to the witness, John Kennedy, to search and seize from his building at 111 West Second Street, Owensboro, Kentucky. (Mr. Beard and Mr. Rummage conferring)

(784) The Court: The Court will point out that it heard the testimony and cross examination of the Witness Kennedy, and in the Court's opinion, just as it was in the case of the witness, Joe Mitchell, very clearly the testimony is competent.

Now, Mr. Rummage will have an opportunity to call any and all witnesses for any purpose that he might see fit when it comes time for him to present his case. But the Court certainly feels that now is not the appropriate time, and that the testimony of the Witness Kennedy is competent. And I so rule, to which ruling the Defense excepts and objects and continues to except.

AVOWAL.

Mr. Rummage: Now, I'd like to—I'd like to say that if the witness, Robert Short, were permitted to testify this is—this is an avowal—at this time on the question of competency of evidence, which is a question for the Court, would state that on the occasion mentioned by Mr. Kennedy in his testimony just recorded, on the 24th day of

January, 1964, that he was present when the conversation took place between Mr. Stone, the Defendant, and Mr. Kennedy, and that the sole conversation at the time the alleged consent was given was for the sifting of ashes by Mr. Kennedy to make an attempt to find diamonds in the fire.

And further that—and I would like to state to the Court—this is not part of the avowal—that Mr. Kennedy (785) is not competent to testify under the fruit of poison tree doctrine inasmuch as he was on the premises by his own admission and searched twice before he even got permission from the Defendant under his allegation, and to permit this witness to testify under those conditions where he is an admitted trespasser on two occasions before he got permission under this theory, would be an abuse of discretion by this Court and would be a violation of the Defendant's Constitutional rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, and under the tenth—Section 10 of the Kentucky Constitution.

The Court: The—all the testimony the Court has before it is to determine that the Witness Kennedy, merely looked, and did not gather any evidence, take any photographs, or do invest—investigation work until a later time. All right.

Mr. Rummage: One final word, I'd like for— (both talking)

Mr. Beard: Coveralls and a black bag and you don't do anything, judge.

Mr. Rummage: I would like the record to show that the Court refused to hear the witness, Robert Short, in chambers on the question of competency of evidence of John Kennedy.

(This concluded the conference in chambers.)

* * * * *

(1501) The Court: Well, as stated heretofore in the record, the reason Mr. Kennedy was allowed to testify, which is set out in detail elsewhere, is because the Commonwealth is entitled to have one party at the table. In this case the rule was invoked before the opening statements—the opening statement was made by the Commonwealth and at that time the Court informed the respective counsel that it would be their obligation to keep up with their witnesses and to keep them out of the Courtroom if they intended for them to testify. It is the Court's estimation that well over a hundred witnesses were summoned in this case. Many of them the Court did not know, and is not familiar with and this responsibility was placed upon the respective counsel.

Mr. Aull was, as the Court had observed, and as he readily admitted, present at a time when Captain Freeman and Major Beaty, officers of the Owensboro Fire Department, testified and for that reason, heard a part of the proceedings and in the Court's opinion is not eligible to testify, to which ruling the Defense excepts and objects.

* * * * *

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1008, October Term, 1967

BERNES B. STONE.....PETITIONER

V.

COMMONWEALTH OF KENTUCKY.....RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN BRECKINRIDGE
ATTORNEY GENERAL

GEORGE F. RABE
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions Presented	2-3
Constitutional and Statutory Provisions Involved	3
Statement	4-6
Argument	6-14

MATTERS AND GROUNDS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

ARGUMENT ON PRELIMINARY JURISDICTIONAL QUESTION

THE QUESTIONS PETITIONER HAS NUMBERED I, III, IV, V AND VI HAVE NEITHER BEEN RAISED NOR DECIDED IN THE COURT OF APPEALS OF KENTUCKY SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THEM ON WRIT OF CERTIORARI. ---- 6-7

I. THE AMENDMENT OF THE INDICTMENT AT BEGINNING OF TRIAL TO CONFORM TO LANGUAGE OF CHARGING STATUTE WITHOUT ALLEGING NEW OR DIFFERENT OFFENSE DID NOT DEPRIVE PETITIONER OF RIGHT TO BE INFORMED OF ACCUSATION AND OF RIGHT TO ASSISTANCE OF COUNSEL.. 8-9

II. THERE WAS NO SUCH CONCERT WITH STATE OFFICIALS IN A SEARCH CONDUCTED BY A PRIVATE INVESTIGATOR ON THE INITIATIVE OF AN INSURANCE COMPANY WHICH EMPLOYED HIM AS TO RENDER THE SEARCH WITHIN THE PROHIBITION OF THE FOURTH AMENDMENT; EVEN IF SO, THE RECORD SHOWS CONSENT TO THE SEARCH AS A MATTER OF LAW. ---- 9-10

III. PETITIONER WAIVED ANY QUESTION OF DETERMINATION BY THE COURT OF CONSENT TO A SEARCH BY ARGUING IN THE KENTUCKY COURT THAT IT SHOULD BE SUBMITTED TO THE JURY; IF NOT, CONSENT WAS NEVERTHELESS SHOWN AS A MATTER OF LAW; IF NOT, THE QUESTION IS MOOTED BY THE ARGUMENT UNDER QUESTION II. ... 11

IV. THERE WAS SOME EVIDENCE TO SUPPORT A JURY INSTRUCTION ON ARSON. ... 11-12

V. THE JURY TRIAL GUARANTEE OF THE SIXTH AMENDMENT IS NOT APPLICABLE IN A STATE CRIMINAL TRIAL; THE JURY DID NOT REACH A QUOTIENT VERDICT; A QUOTIENT VERDICT ON PUNISHMENT IS NOT A DENIAL OF JURY TRIAL GUARANTEED BY SIXTH AMENDMENT. ... 12-13

VI. PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION BY THE APPLICATION OF THE RULE EXCLUDING WITNESSES AS TO PETITIONER'S WITNESS WHO WAS IMPROPERLY IN THE COURTROOM DURING TRIAL AND THE FAILURE TO APPLY IT TO A PROSECUTION WITNESS WHO WAS IN THE COURTROOM BY STIPULATION. ... 13-14

CONCLUSION ... 15

Appendices (Attached):

A Relevant Excerpt from Transcript of Evidence, pp. 389-391, Allstate Contract Provisions on Investigation of Loss. ... 16-17

B Relevant Excerpt from Transcript of Record, pp. 48-53, Affidavits of Jurors as to Verdict ... 18-22

C Relevant Excerpt from Transcript of Evidence, p. 21. Voir Dire Concerning Witnesses. ... 23

CITATIONS

Cases:

Beck v. Washington
369 U.S. 541 (1962) ... 7

Burdeau v. McDowell
256 U.S. 465 (1921) ---- 9

Edelman v. California
344 U.S. 357 (1953) ---- 7

Fay v. New York
332 U.S. 261 (1947) ---- 12

Jackson v. Denno
378 U.S. 368 (1964) ---- 11

Maxwell v. Newbold
18 How. (U.S.) 511 (1856) ---- 8

Thompson v. Louisville
362 U.S. 199 (1960) ---- 12

Constitution of the United States:

Fourth Amendment ---- 2, 3, 9

Sixth Amendment ---- 2, 3, 12

Fourteenth Amendment ---- 3

Statutes:

KRS 227.270 ---- 4, 10

KRS 433.020 ---- 4, 5, 8

28 U.S.C. 1257(3) ---- 1

Miscellaneous:

Annotation 8 A.L.R. 3rd 335 (1966) ---- 12, 13

Annotation, 100 L.ed. 1200 (1956) ---- 7

Annotation, 84 L.ed. 925 (1940) ---- 7

Rule 23-1(f), Rules of the Supreme Court ---- 7

IN THE

Supreme Court of the United States

No. 1008, October Term, 1967

BERNES B. STONE ----------*Petitioner*

V.

COMMONWEALTH OF KENTUCKY ----------*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the Court of Appeals of Kentucky is styled *Bernes B. Stone v. Commonwealth of Kentucky*, reported in 418 S.W. 2d 646 (1967).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (3), the proper provision for review of a state court judgment in a criminal case on certiorari. However, as will appear from the first portion of our argument, five of the questions petitioner attempts to present here under the Constitution of the United States have never been properly presented to or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment on writ of certiorari.

QUESTIONS PRESENTED

The jurisdictional question raised below by respondent is not stated in the petition. Therefore, in order to retain the same numerical order of questions presented, the jurisdictional question will simply be labeled "preliminary jurisdictional question.".

PRELIMINARY JURISDICTIONAL QUESTION

Whether the questions petitioner has numbered I, III, IV, V and VI have been properly raised and decided in the Court of Appeals of Kentucky so as to give this Court jurisdiction to review them on writ of certiorari.

I.

Whether the amendment of the indictment at the beginning of trial to conform to the language of the statute without alleging a new or different offense deprived the petitioner of the right to be informed of the nature and cause of the accusation and the assistance of counsel contrary to the Sixth Amendment.

II.

Whether the product of a search conducted by a private investigator is barred from evidence by the Fourth Amendment to the Constitution of the United States; if so, whether the record shows as a matter of law that the search was proper as a consent search.

III.

Whether petitioner waived any question of determination by the Court of consent to a search; if not, whether consent was shown as a matter of law; if not, whether the question is mooted by the disposition of Question 11.

IV.

Whether there was some evidence to support a jury instruction on arson.

V.

Whether the jury trial guarantee of the Sixth Amendment is applicable in a state criminal trial; whether the jury reached a quotient verdict; if so, whether a quotient verdict to determine the years of sentence deprives the accused of a jury trial in violation of the Sixth Amendment.

VI.

Whether the trial court's refusal to permit a circumstantial evidence witness for the defense to testify under the rule excluding witnesses and permission for a prosecution witness to testify, where there was a reasonable difference as to the circumstances of each witness, constituted an abuse of discretion amounting to a violation of Due Process of law or Equal Protection of law contrary to the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Petitioner correctly quotes the Search and Seizure Clause of the Fourth Amendment, the Trial by Jury, Informing of Accusation, and Assistance of Counsel Clauses of the Sixth Amendment, and Due Process and Equal Protection Clauses of the Fourteenth Amendment on which he relies. However, in addition to the other arguments of respondent, it will be contended hereinafter that *Trial by Jury*, as distinguished from requirement of *impartial* jury, as guaranteed by the Sixth Amendment does not apply to state criminal proceedings.

Kentucky Statutes

Respondent contends that Section 227.270 of the Kentucky Revised Statutes (KRS 227.270) referred to in the Petition (pp. 4, 11) is *not* involved in any of the issues on this appeal.

Section 433.020 of the Kentucky Revised Statutes provides:

> "Any person who willfully and maliciously sets fire to, burns or causes to be burned, or who aids, counsels or procures the burning of any barn, stable, garage or other building, whether the property of himself or another, that is not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or another; or any church, meeting house, courthouse, workhouse, school, jail or other public building, or any public bridge shall be confined in the penitentiary for not less than one nor more than ten years."

STATEMENT

The case is substantially stated correctly by petitioner. (Petition, pp. 5-8). However, the following material additions and corrections are made.

First, it should be noted that no Federal constitutional question was briefed or decided by the Court of Appeals of Kentucky on the questions petitioner has numbered:

I (Brief for Appellant (petitioner) in Court of Appeals of Kentucky, hereafter Brief, pp. 19-21);

III (There was no place this subject was even mentioned in the Brief or opinion);

IV (Brief, 31-35);

V (Brief, 29-31);

VI (Brief, 11-15).

The only place that the Constitution of the United States was mentioned in the Court of Appeals of Kentucky was in connection with the search and seizure claim pertaining to the

evidence produced by the witness, Kennedy. (Appendix to Petition 4A).

The amendment to the indictment did *not* state a *new charge* as claimed by petitioner. (Petition p. 5). It merely clarified the charge by reiteration of the language of the statute it was brought under, Section 433.020 of the Kentucky Revised Statutes (KRS 433.020, set out above; Appendix to Petition, pp. 11a, 12a; Transcript of Record, hereafter TR, 2, 28). The only significant addition by the amendment was the language "caused to be burned, or aided, counselled, or procured" the burning. No question of surprise was presented nor was there any request for a continuance. (Appendix to Petition, pp. 11a, 12a; TR 25).

Petitioner's references to the search made by the witness, Kennedy, are incomplete. Petitioner correctly notes that the witness was a private, professional fire and explosive investigator. (Petition, p. 6). Mr. Kennedy was engaged by Allstate Insurance Company (Transcript of Evidence, hereafter TE, 385). Petitioner fails to note that the conversation between Kennedy and petitioner on January 24, 1964, regarding permission to inspect petitioner's premises was *in the presence of petitioner's attorney.* (TE 772). Petitioner "and his attorney" said on that day they "would cooperate in every way possible." (TE 779). Kennedy testified unequivocally that petitioner consented to search of his premises during the conversation on January 24. (TE 771, 786). In addition to that evidence of consent, it was also shown that petitioner's contract of insurance with Allstate Insurance Company gave his written consent and authorized investigation by the insurance company which was carried out by Kennedy. (TE 390, 391; Appendix A to this Brief). Petitioner testified at trial that he had no right to object to the investigation by Allstate and would have consented in any event. (TE 1302-1305).

There was no quotient verdict as to the length of sentence as stated by petitioner (Petition, pp. 7, 8). While petitioner

obtained the affidavits of three of the jurors to that effect, eleven jurors out of the twelve (including two of the original three whose affidavits were filed on behalf of petitioner) made affidavits that the jurors all expressed their preference of sentence, ranging from one to ten years, then they averaged out the preferences and discussed them. They then all agreed on four years as the sentence for petitioner. (TR 48-53; Appendix B to this Brief). This was not a quotient verdict as will be demonstrated under Argument V hereafter.

As to the witness, Kennedy, as to whose testimony petitioner complains (1) because he was allowed in the courtroom although the exclusion of witnesses rule was in effect and (2) because testimony of a witness for petitioner was excluded under the rule, it may be noted that petitioner's counsel was aware that Kennedy was a key witness but stipulated in open court that he could remain at counsel table with the prosecutor. (TE 20, 21; Appendix C to this Brief). There was no such agreement as to petitioner's witness, Aull, a fireman who was in the courtroom during the testimony of two other firemen in violation of the rule (TE 1497).

MATTERS AND GROUNDS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT.

ARGUMENT ON PRELIMINARY JURISDICTIONAL QUESTION

THE QUESTIONS PETITIONER HAS NUMBERED I, III, IV, V AND VI HAVE NEITHER BEEN RAISED NOR DECIDED IN THE COURT OF APPEALS OF KENTUCKY SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THEM ON WRIT OF CERTIORARI.

As noted in the statement of the case, no Federal question was raised or decided in the Court of Appeals of Kentucky ex-

cept that labeled II by petitioner, the search and seizure question.

Rule 23-1 (f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court,* at which, and *the manner in which,* the federal questions sought to be reviewed were raised; *the method of raising them* (e.g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."* (Emphasis added.)

The subject matter of what indication that a state court's decision turned on a federal question will move the Supreme Court to review it is extensively discussed in Annotations at 84 L.ed. 925 (1940) and 100 L.ed. 1200 (1956). As indicated, and supported by a great mass of authorities from this Court, it is necessary for a petitioner to show that a federal question actually arose in a case (84 L.ed. 927), and that it was actually passed upon and decided by a state court. 84 L.ed. 935.

In *Edelman v. Californmia,* 344 U. S. 357 (1953), this Court stated:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

In *Beck v. Washington,* 369 U. S. 541, 553 (1962), the reference to petitioner's constitutional contention in one sentence of

his brief in the Washington Supreme Court was considered to be an insufficient raising of the question.

Finally, as stated in *Maxwell v. Newbold,* 18 How. (U. S.) 511 (1856):

> ". . . But to bring that question for decision in this court, it is not sufficient to raise the objection here, and to show that it was involved in the controversy in the state court, and might, and ought, to have been considered by it when making its decision. It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and their decision against the right claimed under it."

It is manifest that, except for Question II, the petitioner has not shown that the questions he raises herein were properly presented and decided in the Court of Appeals of Kentucky and they have not been brought within the jurisdiction of this Court.

ARGUMENT I

THE AMENDMENT OF THE INDICTMENT AT BEGINNING OF TRIAL TO CONFORM TO LANGUAGE OF CHARGING STATUTE WITHOUT ALLEGING NEW OR DIFFERENT OFFENSE DID NOT DEPRIVE PETITIONER OF RIGHT TO BE INFORMED OF ACCUSATION AND OF RIGHT TO ASSISTANCE OF COUNSEL.

The amendment to the indictment merely added language indicating commission of the crime of arson by aiding, counselling, or procuring the offense. This was the language of Kentucky Revised Statute 433.020, the charging statute, the number of which had already been endorsed on the original indictment. It did not state a new or different charge.

It is significant in connection with the effect of this amendment that petitioner did not even request a continuance. It is inconceivable, in view of the reference in the original indictment

to the statute which contains the language complained of, either that petitioner was unaware of the nature of the charge or that the assistance of his counsel was adversely effected.

We see no substance whatsoever to this contention. In addition, it is not properly before this Court as previously noted, because of lack of argument and decision in the Court of Appeals of Kentucky.

ARGUMENT II

THERE WAS NO SUCH CONCERT WITH STATE OFFICIALS IN A SEARCH CONDUCTED BY A PRIVATE INVESTIGATOR ON THE INITIATIVE OF AN INSURANCE COMPANY WHICH EMPLOYED HIM AS TO RENDER THE SEARCH WITHIN THE PROHIBITION OF THE FOURTH AMENDMENT; EVEN IF SO, THE RECORD SHOWS CONSENT TO THE SEARCH AS A MATTER OF LAW.

The only connection petitioner has shown between state officials and Kennedy, who was a private investigator hired by the insurance company which insured the premises on which the arson was committed, is that on the occasion when the investigator *conferred* with the petitioner about the investigation *in the presence if petitioner's attorney*, a state arson investigator was also present. The inspection of the premises was conducted by Kennedy without any participation by state officers and no contention is made to the contrary. The evidence as a result of the inspection was retained by Kennedy for the insurance company and was not connected with the State until it was used in evidence at the trial. The admission of this evidence obtained solely by a private investigator was proper under *Burdeau v. McDowell*, 256 U.S. 465 (1921). Petitioner seeks to distinguish that case on the ground that the state officers had no connection

at all with the case until after the search had been made. That is a distinction without a difference and misses the point of the *Burdeau* case. There is no question that the investigation by Kennedy was entirely motivated and initiated through his employment by Allstate Insurance Company. Allstate was obviously interested in its policy of insurance. The State was interested in the crime of arson. There is nothing unusual about the fact that both private investigator Kennedy and the State arson investigator were present at a formal meeting with petitioner when the subject of the fire was discussed in the presence of his attorney. The significant point is that, in this case, as in *Burdeau*, the government had nothing to do with the search and it did not fall within the purview of the Fourth Amendment.

Moreover, laying aside that contention for the moment for the sake of argument, the search was nevertheless shown to be a consent search as a matter of law. The witness, Kennedy, testified consent was given by petitioner *in the presence of his counsel*, after full explanation that Kennedy was investigating whether the fire was natural or wrongful. Petitioner had executed a contract of insurance with Allstate authorizing the private investigation he complains of. Petitioner conceded under oath on the witness stand that Kennedy had the *right* to make the investigation for the insurance company, and he would have consented to it if asked. He could have foregone any rights under the policy and asserted his right to privacy. This he declined to do *with the assistance of counsel*; he consented to the search.

There is no need to argue the constitutionality of KRS 227.270, referred to by petitioner. We do not seek in the least to justify Kennedy's search by that statute, nor did the Kentucky Court of Appeals.

There is no substantial Federal question presented by the search and seizure claim.

ARGUMENT III

PETITIONER WAIVED AND QUESTION OF DETERMINATION BY THE COURT OF CONSENT TO A SEARCH BY ARGUING IN THE KENTUCKY COURT THAT IT SHOULD BE SUBMITTED TO THE JURY; IF NOT, CONSENT WAS NEVERTHELESS SHOWN AS A MATTER OF LAW; IF NOT, THE QUESTION IS MOOTED BY THE ARGUMENT UNDER QUESTION II.

Petitioner contended in the Court of Appeals of Kentucky that the question of his consent to the search by Kennedy should have been submitted to the jury. (Brief for Appeallant (Petitioner) in Court of Appeals of Kentucky, pp. 6-11). There was no contention in the Court of Appeals that the consent question was a matter for the court. Clearly, petitioner has waived any right in this regard. There is no need for this Court to determine the applicability of the principle of *Jackson v. Denno*, 378 U.S. 368 (1964).

As noted in our statement above, Kennedy testified petitioner consented to his investigation in the presence of petitioner's counsel. Petitioner's contract of insurance with Allstate clearly authorized the investigation Kennedy made. Finally, petitioner conceded in cross-examination during trial that the insurance company had the right to make its investigation under the policy. Thus, consent was shown as a matter of law, and there is no need for a trial court finding in order to dispose of this issue.

In addition, this question is mooted if our contention with respect to Question II is sustained.

Finally, as noted under our jurisdictional argument, this question was neither argued nor decided in the Court of Appeals of Kentucky and this Court lacks jurisdiction over it.

ARGUMENT IV

THERE WAS SOME EVIDENCE TO SUPPORT A JURY INSTRUCTION ON ARSON.

The circumstantial evidence indicating petitioner's guilt of arson is summarized in that portion of the opinion of the Court of Appeals of Kentucky set out on pages 6a and 7a of the Appendix to the Petition. It is sufficient to note that under the circumstantial evidence submitted, the jury could have inferred that petitioner aided or procured another to set the fire or did it himself. Thus, this case presents no circumstances remotely resembling *Thompson v. Louisville*, 362 U.S. 199 (1960), under which a conviction *devoid of evidence* to support it was a denial of Due Process. The *sufficiency* of evidence, is, of course, not a federal question.

As noted in our jurisdictional argument, this question was not argued and decided in the Court of Appeals of Kentucky so as to bring it within the jurisdiction of this Court.

ARGUMENT V

THE JURY TRIAL GUARANTEE OF THE SIXTH AMENDMENT IS NOT APPLICABLE IN A STATE CRIMINAL TRIAL; THE JURY DID NOT REACH A QUOTIENT VERDICT; A QUOTIENT VERDICT ON PUNISHMENT IS NOT A DENIAL OF JURY TRIAL GUARANTEED BY SIXTH AMENDMENT.

The Federal Constitution does not guarantee a *trial by jury* in state courts as distinguished from a trial by *impartial* jury once a jury trial is given by state law. *Fay v. New York*, 332 U.S. 261, 288 (1947).

Even if a jury trial were required in state criminal proceedings by the Sixth Amendment, it was not denied by a quotient verdict in this case as contended by petitioner. There is an exhaustive and excellent Annotation on quotient verdicts at 8 A.L.R. 3rd 335 (1966). As pointed out therein, an invalid quotient verdict is one where the jurors agreed prior to obtain-

ing the quotient that they would be bound by it and accept it as their verdict. 8 A.L.R. 3rd at 349. Use of the quotient process to obtain a jury verdict without an agreement to be bound by it is not improper. 8 A.L.R. 3rd at 355, 357. The references in our Statement clearly show that the jurors in this case reached a verdict on punishment of four years by a process of comparing their respective opinions. They *then* agreed on the four years. There was nothing improper in this. Twelve jurors were faced with the duty of reaching a single unanimous verdict as to a figure covering a span of one to ten years. Common sense tells us that could they not pursue some constructive discussion toward ultimate agreement every criminal case would end in a hung jury under the Kentucky practice of jury fixing of punishment.

Finally, petitioner's complaint about a quotient verdict relates to *punishment* and not to the determination of *guilt*. This Court judicially knows that punishment in Federal courts is determined by the court and not by the jury. It is utterly inconceivable that petitioner could have been denied a Federal right to trial by jury as to punishment.

As noted in our jurisdictional argument, this question also was not properly briefed and decided in the Court of Appeals of Kentucky so as to bring it within the jurisdiction of this Court.

ARGUMENT VI

PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION BY THE APPLICATION OF THE RULE EXCLUDING WITNESSES AS TO PETITIONER'S WITNESS WHO WAS IMPROPERLY IN THE COURTROOM DURING TRIAL AND THE FAILURE TO APPLY IT TO A PROSECUTION WITNESS WHO WAS IN THE COURTROOM BY STIPULATION.

A fireman was permitted to testify for petitioner as to the negative evidence that he did not detect accelerant fumes on the second floor of the building burned because he was improperly in the courtroom during the testimony of two other firemen in violation of the rule excluding witnesses which was requested both by the prosecution and by petitioner. On the other hand, testimony of the witness Kennedy was not excluded under the rule because he was present in the courtroom by stipulation of petitioner.

Petitioner refers to a "practice" of having the witness sitting with the prosecution testify first "under Kentucky law," and therefore says the testimony of Kenendy should have been excluded. (Petition, p. 8). We are unaware of any Kentucky law to that effect and petitioner who has the burden cites none.

The rational distinction between the circumstances surrounding the application of the rule excluding witnesses as to the witness Aull and the witness Kennedy is an adequate answer both to the Due Process and to the Equal Protection contentions of petitioner. In other words, the application was in the exercise of a *reasonable* discretion by the trial court.

As noted in our jurisdictional argument, this question also was neither argued nor decided in the Court of Appeals of Kentucky so as to bring it within the jurisdiction of the Court.

CONCLUSION

No question presented in the petition is within the jurisdiction of this Court except the search and seizure question. Petitioner has failed to show that a Federal question of substance, including the search and seizure question, was decided by the Kentucky Court of Appeals in a way probably not in accord with applicable decisions of this Court. On the contrary, the opinion of the Kentucky Court of Appeals is manifestly consistent with the Constitution of the United States and the decisions of this Court, and the petition for writ of certiorari should be denied.

Respectfully submitted,

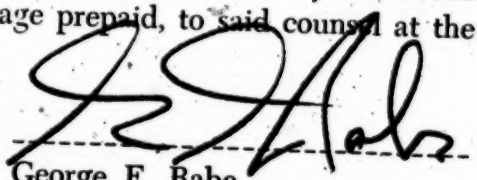
JOHN B. BRECKINRIDGE
ATTORNEY GENERAL

BY: George F. Rabe
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, George F. Rabe, one of counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of March, 1968, I served a copy of the foregoing brief on Jack G. Day, 1748 Standard Building, Cleveland, Ohio 44113, and William E. Rummage, Masonic Building, Owensboro, Kentucky 42301, counsel for petitioner, by mailing a copy in a duly addressed envelope with first class postage prepaid, to said counsel at the above address.



George F. Rabe

APPENDIX A

RELEVANT EXCERPT FROM TRANSCRIPT OF EVIDENCE, pp. 389-391, ALLSTATE CONTRACT PROVISION ON INVESTIGATION OF LOSS.

"Q. 15 And is that, as a matter of fact, in the Allstate Policy?

A. This is exactly the same words.

Q. 15 All right, sir. And read that to the Jury, would you please?

A. Line 90 starts "Requirements in case" of loss—or in case of a "loss occurs." It states that "The insured shall give immediate written notice to this Company of any loss; protect the property from any further damage; forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish complete inventory of the destroyed, damaged, and undamaged property showing in detail quantities, cost, actual cash value, and amount of loss claimed; and within sixty (60) days of the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured—" excuse me just a minute—"the interest of the insured and of all others in the property, the actual cash value of each item thereof, and the amount of loss thereto all encumbrances thereon, and all other contracts of insurance, whether they be valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose the building herein described and several parts thereof were occupied at the time of loss and whether or not it then stood on leased grounds and shall furnish a copy of all the descrip-

tions and schedules of all policies, and, if required, verif— if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and shall submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of accounts, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extra copies—and shall permit extracts and copies thereof to be made." And that concludes the line 123. That is what I read to him that day.

Q. 16 And this—I'll ask you if this is the exact copy that you read to him on that occasion?

A. This is the—this is the exact copy."

APPENDIX B

RELEVANT EXCERPT FROM TRANSCRIPT OF RECORD, pp. 48-53, AFFIDAVITS OF JURORS AS TO VERDICT.

"STATE OF KENTUCKY)
) SCT.
COUNTY OF DAVIESS)

AFFIDAVIT

Comes the affiant herein Guy Harrison, after first being duly sworn and deposes and states as follows, towit:

That the affiant is a juror on the Daviess County Petit July, having served during the August and September, 1964 periods of the Daviess Circuit Court; that affiant was a member of the Petit Judy, was duly sworn and served as a member of the jury in the case of Commonweal!th of Kentuck vs. Bernes B. Stone, No. 15715.

That after this case was submitted to the jury, and after we retired to the Jury Room for our deliberations, each juror submitted to Roby Robertson, foreman, the number of years which represented each jurors' verdict, and it was agreed by all of the jurors that all of the twelve numbers submitted would be totalled and divided by twelve, and that the average figure determined by the division to the nearest year would be the verdict of the jury, and that each juror was bound by this average figure. Subsequently, each juror did not reaffirm this four-year sentence as being their individual verdict.

IN TESTIMONY WHEREOF witness my signature this 12th day of September, 1964.

/s/s GUY HARRISON"

———ooo———

"STATE OF KENTUCKY)
) SCT.
COUNTY OF DAVIESS)

AFFIDAVIT

Comes the affiant herein Golden Acton, after first being duly sworn and deposes and states as follows, towit:

That the affiant is a juror on the Daviess County Petit Jury, having served during the August and September, 1964 periods of the Daviess Circuit Court; that affiant was a member of the Petit Jury, was duly sworn and served as a member of the jury in the case of Commonwealth of Kentucky vs. Bernes B. Stone, No. 15715.

That after this case was submitted to the jury, and after we retired to the Jury Room for our deliberations, each juror submitted to Roby Robertson, foreman, the number of years which represented each jurors' verdict, and it was agreed by all of the jurors that all of the twelve members submitted would be totalled and divided by twelve, and that the average figure determined by the division to the nearest year would be the verdict of the jury, and that each juror was bound by this average figure. Subsequently, each juror did not reaffirm this four-year sentence as being their individual verdict.

IN TESTIMONY WHEREOF witness my signature this 14th day of September, 1964.

/s/ GOLDEN ACTON"

———ooo———

"STATE OF KENTUCKY)
) SCT.
COUNTY OF DAVIESS)

AFFIDAVIT

Comes the affiant, Hugo Zozjeck, after first being duly

sworn and deposes and states as follows, towit:

That the affiant is a juror on the Daviess County Petit Jury, having served during August and September, 1964, periods of the Daviess Circuit Court; that affiant was a member of the Petit Jury, was duly sworn and served as a member of the jury in the case of Commonwealth of Kentucky v. Bernes B. Stone, No. 15715.

That after this case was submitted to the jury, and after we retired to the Jury Room for our deliberations, each juror submitted to Roby Robertson, foreman, the number of years which represented each juror's verdict, and it was agreed by all of the jurors that all of the twelve numbers submitted would be totalled and divided by twelve, and that the average figure determined by the division to the nearest year would be the verdict of the jury, and that each juror was bound by this average figure, and to this each juror agreed.

IN TESTIMONY WHEREOF, witness my signature this 15th day of September, 1964.

/s/ HUGO ZOBJECK"

———ooo———

"ORDER

September 16, 1964

This day came William M. Gant, Commonwealth Attorney, and filed herein the Joint Affidavit of Roby Robertson, Joe Mullican, Golden Acton, J. B. Thompson, Sr., O. F. McEuen, James A. Abel, Wm. M. Leonard, Martin Bresler, Mark Mattingly, William R. Covin and Hugo Zobjeck, in opposition to defendant, Bernes B. Stone's motion for a new trial of this prosecution against him.

———ooo———

STATE OF KENTUCKY)
) SCT.
COUNTY OF DAVIESS)

AFFIDAVIT

Come the affiants, Roby Robertson, Foreman, Joe Mullican, Golden Acton, Guy Harrison, J. B. Thompson, Sr., O. F. McEuen, James A. Abel, William A. Leonard, Martin Bresler, Mark Mattingly, William R. Cavin, Hugo Zobjeck, and being first duly sworn state as follows: That they composed the Jury panel in the case of Commonwealth of Kentucky vs. Bernes B. Stone, Criminal Prosecution No. 15715 in the Daviess Circuit Court. Affiants state further that after determining by unanimous vote taken twice by the foreman that the defendant, Bernes B. Stone, was guilty as charged in the indictment, they attempted severally and collectively to fix the punishment of the defendant. They state that the foreman, Roby Robertson, polled each of the jurors concerning his preference as to sentence, which preferences ranged from one year to ten years. They state further that thereafter it was determined from addition of the preferences stated by each juror that the total time added together was fifty-four years, which when divided by twelve produced an average sentence of approximately four and a half years. Affiants further state that thereupon the entire jury made an effort to reach a verdict based upon the average time arrived at by the above method and that some of those jurors who had expressed a preference for a time in excess of four years agreed that they would agree to four years and some of those who had expressed a preference for less than four years indicated that they would agree to four years, whereupon the jury was again polled by the foreman and each juror asked to vote on the four year sentence. Affiants state that each and every juror, either by the raise of hand or a vocal "yes" agreed that the sentence be fixed at four years in prison and each of the affiants hereto state that it was his agreement, that he voted for a four year sentence and that

to his knowledge each member of the jury voted for a four year sentence so that it was a unanimous verdict of this jury and not cast by lot but by decision between the members to arrive at a fair sentence.

IN TESTIMONY WHEREOF, witness our signatures on this the 16th day of September, 1964."

[Eleven signatures and notarization omitted. Guy Harrison did not sign.]

APPENDIX C

RELEVANT EXCERPT FROM TRANSCRIPT OF EVIDENCE, p. 21, VOIR DIRE CONCERNING WITNESSES.

"Mr. Gant stated that he was going to ask Mr. Kennedy to be at his counsel table and that Mr. Rummage had no objection.

THEREUPON, voir dire examination was begun. During said voir dire examination there was an objection by Mr. Rummage, Counsel for the defense, and a conference at the bench and the following for the record:

(MR. RUMMAGE: I object to the question Mr. Gant asked whether they had an opinion of guilty or innocence. and the Court being advised overruled the objection, to which ruling the defense excepts and objects.)

Voir dire examination was continued by the Commonwealth, and during the voir dire examination at 3:10 P.M. Mr. Rummage stated the following at a conference at the bench:

MR. RUMMAGE: Comes the Defendant prior to the voir dire of the Jury by the Attorney for the Defendant and moves the Court to require the Commonwealth to bring out at the counsel desk or table, it should be, the individual, prosecuting witness selected by them heretofore to set at counsel table in order that the Defendant's Attorney might question the individual jurors in regard to this gentleman, Mr. John A. Kennedy from Chicago.

THE COURT: Sustain the motion."